IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 35

CARL F. GRUNENTHAL,
Petitioner

v.

THE LONG ISLAND RAILROAD COMPANY,
Respondent

PETITIONER'S BRIEF ON THE MERITS

MILFORD J. MEYER
One East Penn Square
Philadelphia, Pa. 19107
Attorney for Petitioner

Of Counsel:
IRVING YOUNGER
New York University School of Law
Washington Square
New York, New York 10003

MEYER, LASCH, HANKIN & POUL
One East Penn Square
Philadelphia, Pennsylvania 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

INDEX

TABLE OF CITATIONS

Cases:

TABLE OF CITATIONS — *(Continued)*

Cases: Page

TABLE OF CITATIONS — *(Continued)*

Cases:

Constitution:

Statutes:

Other Authorities:

Other Authorities: Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1172

CARL F. GRUNENTHAL,
Petitioner

v.

THE LONG ISLAND RAILROAD COMPANY,
Respondent

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals remanding upon condition and the dissenting opinion thereto are attached hereto (A. 59, 66). They are reported at 388 F. 2d 480, 485. The opinion of the District Court is attached hereto (A. 54). It is not reported as yet.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1968 (App. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 45 U.S.C. 51, 57. Certiorari was granted by this Court on May 6, 1968.

CONSTITUTIONAL PROVISION

The Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTE INVOLVED

The Federal Employers' Liability Act (45 U.S.C. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier, in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury, or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

QUESTIONS PRESENTED

I. Whether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness?

II. Whether a Court of Appeals may order a new trial in an action under the Federal Emloyers' Liability Act solely on the ground that the verdict is "grossly excessive"?

III. Whether the action of the District Court in refusing a new trial in this case is without support in the record?

IV. Whether, assuming the power of the Court of Appeals to act in these circumstances, the granting of a new trial generally in the absence of a remittitur is a proper exercise of such power?

STATEMENT OF THE CASE

Petitioner, an employee of the respondent, instituted this action against it under the Federal Employers' Liability Act (45 U.S.C. 51), to recover damages for severe and permanent injuries suffered by him during the course of his employment. By Order of the District Judge, the issues of liability and damages were separately tried before the same jury (A. 3). The jury rendered its first verdict in favor of petitioner on the liability issue (A. 3).

At the second trial petitioner proved that he had sustained severe injury to his right foot which has required five hospitalizations (A. 6-11), two operations on the foot (A. 11, 14) and a sympathectomy (A. 8). As a result he has been totally and will be permanently disabled (A. 38-43) and has suffered and will continue to suffer great pain (A. 36, 39). Petitioner's testimony at the second trial was uncontroverted. The jury, by its second verdict, assessed damages at $305,000 (A. 49).

Respondent moved for a new trial on various grounds including that the verdict was excessive (A. 41). Its motion was denied (A. 58). Respondent appealed from the judgment entered on the verdict (A. 1). The panel of the Court of Appeals which heard the case divided: Medina, C.J. wrote the opinion for the court (A. 60); Hays, C.J. wrote the dissenting opinion (A. 66).

The majority held that there was no merit in any of the respondent's arguments as to trial errors (A. 61, 63) but that the verdict was excessive (A. 61, 64) and remanded for a new trial unless petitioner agreed to remit all of the verdict in excess of $200,000 (A. 66). Judge Hays held that the court was substituting its opinion for the verdict of the jury (A. 67). Petitioner sought certiorari, which was granted May 6, 1968.

SUMMARY OF ARGUMENT

I. The Seventh Amendment forbids the reexamination of facts tried by a jury except according to the rules of the common law. This Court has consistently held that appellate courts in the Federal system are thereby prohibited from reviewing any factual issue, including the quantum of a verdict, if it has been decided by a jury and sustained by the trial court. The Courts of Appeals have departed from this principle and assumed the power to review jury verdicts which they feel are excessive. They have justified their action by (a) declaring that the common law permitted appellate review, (b) stating that they were not reviewing the fact found by the jury but deciding a question of law as to whether the trial judge had abused his discretion in failing to set aside the jury verdict, or (c) concluding that reinterpretation of the Amendment was needed because of the growth of modern court procedures. None of these reasons justify the overruling of all prior decisions of this Court.

II. The preservation of a jury verdict is an integral part of the right given the railroad worker by the Federal Employers' Liability Act. This Court has firmly established that the extent of appellate review is limited entirely to a determination of whether there is any evidence whatsoever to support the verdict. The principle is not, and cannot be, different in reviewing the quantum of a verdict. The action of the court below, in interfering on the basis that the verdict is excessive, is beyond its power.

III. The verdict in the case at bar is not without support in the record. In fact, an examination of the uncontradicted testimony fully supports it. Both the trial judge, who saw and heard the witnesses, and the dissenting judge below could find no justification for interfering with it.

IV. Remand for a new trial in the absence of a remittitur is not a proper exercise of the power to review, even if it does exist. This point need not now be pressed in view of respondent's concession.

ARGUMENT

I.

CONSTITUTIONAL LIMITATION

The Seventh Amendment to the Constitution provides, in part, that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Court of Appeals, by holding that the damages awarded by the jury and approved by the trial court were excessive in this case, has assumed a power which is constitutionally denied it.

Decisions of this Court

From its first decision dealing with this question, *Parsons v. Bedford*, 3 Pet. 433 (1830), to its most recent opinion touching upon it, *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), this Court has uniformly held that the appellate courts of the United States are prohibited by the Amendment from interfering with any finding of fact made by a jury and approved by the trial court. In *Parsons v. Bedford*, the principle was stated by Mr. Justice Story (447-448):

> "But the other clause of the amendment is still more important, and we read it as a substantial and inde-

pendent clause, 'No fact tried by jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. . . . The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings."

Following and confirming this principle were *Phillips v. Preston*, 5 How. 278 (1847), *Barreda v. Silsbee*, 21 How. 146 (1858), *Insurance Company v. Folsom*, 18 Wall. 237 (1873).

In *Railroad Co. v. Fraloff*, 100 U.S. 24 (1879), this Court first met the specific question of whether the alleged excessiveness of a verdict was reviewable on appeal. Holding that it was not, Mr. Justice Harlan said (31):

"No error of law appearing upon the record, this Court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been

tried by the jury under instructions correctly defining the legal rights of parties."

The specific question recurred and was similarly answered in *Wabash Railway Co. v. McDaniels*, 107 U.S. 454, 456 (1882); *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 574 (1887); *Arkansas Cattle Co. v. Mann*, 130 U.S. 69, 75 (1889); *Fitzgerald Const. Co. v. Fitzgerald*, 137 U.S. 98, 113 (1890); *Erie Railroad Co. v. Winter*, 143 U.S. 60, 75 (1892); *Lincoln v. Power*, 151 U.S. 436, 438 (1894); *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 469 (1903); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 181 (1909); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910); *Southern Ry. Co. v. Bennett*, 233 U.S. 80, 87 (1914); *St. Louis & S. R. Co. v. Craft*, 237 U.S. 648, 661 (1915); *Louis. & Nash. R. Co. v. Holloway*, 246 U.S. 525, 529 (1918). That the denial of appellate power to review rested upon the Constitutional limitation was specifically stated in *Wabash Railway Co.*, *Metropolitan Railroad Co.*, and *Lincoln*, supra, and was clearly implied in *Arkansas Valley*, *Texas & Pacific*, *Waters-Pierce Oil Co.*, *Herencia*, *Southern Ry.*, *St. Louis & S. Ry.*, and *Louis. & Nash. R.R. Co.*, supra, by the Court's reliance on one or more of the decisions specifically so holding.

In *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474 (1933), this Court had reason to refer to its prior decisions while considering the right to review a nominal verdict and abstaining from deciding the question (485). There Mr. Justice Brandeis said (481-482):—

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. **The rule precludes likewise a review of such action by a Circuit Court of Appeals** . . . Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by

> a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law'. More frequently the reason given for the denial of review is that the granting or refusal of a motion for a new trial is a matter within the discretion of the trial court." (Emphasis supplied)

Some of the language of this opinion has frequently been cited by the Courts of Appeals as indicating a departure by this Court from its earlier decisions. In the course of its disposition of the arguments made for reversal, the Court noted that it was urged that the "refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable" (485). The clear holding of the decision follows (485):

> "Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion . . . Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine."

This language of the Court, carefully chosen so as to limit its decision to the precise question before it, cannot reasonably serve as an argument for the contrary position that appellate intervention may be justified on the ground of "abuse of discretion" by the trial court. Nothing said in *Fairmount Glass* can be construed to represent a departure by this Court from its long established position. In fact, when this Court later came to consider the authority of the trial court to direct an additur and the right of the Court of Appeals to reverse for the exercise of that right (when the defendant consents to it), both the majority and dissenting opinions conceded the earlier expressed view: *Dimick v. Schiedt*, 293 U.S. 474 (1935). Although the Courts of Appeals have used the dissenting opinion of Mr. Justice Stone as an argument against Seventh Amendment limitation (see infra), it will be observed that he there said (489):

> "As a corollary to these rules is the further one of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. . . . This is but a special application of the more general rule that an appellate court will not reexamine the facts which induced the trial court to grant or deny a new trial."

Strength for an opposing view is also sought to be drawn from the comment by Mr. Justice Clark in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96 (1950) that the verdict (affirmed by the Court of Appeals) was not "monstrous". The Court of Appeals had not discussed the propriety of the verdict but had held (174 F. 2d 486) that it had no power to review it. Certainly, this parenthetical remark, unrelated to the decision in the case, does not indicate this Court's willingness to overrule prior authority.

Finally, the precise question here presented was before the Court on certiorari in *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), in which the Fourth Circuit was reversed for reviewing the amount of the verdict, without this Court reaching the basic question of appellate authority. This Court there said:

> "We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive."

In 1880, then, this Court established the principle that appellate review of issues of fact was prohibited by the Seventh Amendment and by 1879 it had specifically held that such prohibition extends to and includes the review of the alleged excessiveness of a verdict approved by the trial court. Its position has not varied to the present time.

Decisions of the Courts of Appeals

Despite the clear interdiction by this Court of such power, the Courts of Appeals have gradually moved from early acceptance to more recent denial of the authority of this Court's decisions. They have now assumed to exercise it and to review verdicts approved by the trial courts to determine whether they are excessive. This assumption of power has been variously justified by arguments that (a) "the rules of the common law" permitted appellate review, (b) review for "abuse of discretion" of the trial judge is not re-examination of a question of fact but a matter of law, and (c) the Seventh Amendment should be reinterpreted more broadly in the light of modern procedures. None of these arguments are valid.

It would serve little purpose to review in detail the excursion of these courts from acceptance of the principle of Constitutional limitation of their power, through rationalization of the "need" for appellate supervision, to the bold statement of inherent power, either ignoring this Court's decisions or declaring the invalidity of their bases. Examination of each of the three routes along which the journey has been taken will, we believe, expose its illogic. Their wide acceptance by the courts making them must be attributed to the conflict which Mr. Justice Black points out in his dissenting opinion in *Galloway v. United States*, 319 U.S. 372, 400 (1943) at 406:

> "Speaking of an aspect of this problem, a contemporary writer saw the heart of the issue: 'Such a reversal of opinion (as that of a particular state court concerning the jury function), if it were isolated, might have little significance, but when many other courts throughout the country are found to be making the same shift and to be doing so despite the provisions of statutes and constitutions there is revealed one aspect of that basic conflict in the legal history of America—the conflict between the people's aspiration

for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges.

"What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions. It is possible to feel that the final solution of the problem has been wise without approving the frequently arrogant methods which courts have used in reaching that result." (*Howe: Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 615-616).

(a)

The first argument advanced by the Courts of Appeals is that the right to review excessiveness of verdicts existed at common law prior to the adoption of the Seventh Amendment in 1791 and, therefore, such review is not prohibited. Although the courts making this argument sometimes concede that such judges as Mr. Justice Story were quite familiar with English practice (cf. *Dagnello v. Long Island Rail Road Co.*, 289 F. 2d 797, 803 (1961)),* they apparently assume that, in deciding the early cases above referred to, these Justices made no use of this personal knowledge. On this assumption, reliance is placed upon much more recent research into "the rules of the common law" existing prior to the adoption of the Amendment. The research relied upon is set forth in the majority and dissenting opinions of Judge Edwin R. Holmes, (CA5) in *Sunray Oil Corp. v. Albritton*, 187 F. 2d 475 and 188 F. 2d 751 (1951). A review of the authorities cited and discussed may be left for later discussion in considering the typical case relying upon it: *Dagnello v. Long Island Rail Road Co.*, 289 F. 2d 797 (1961). The conclusions reached are (1) that the amounts of verdicts were reviewed and remittiturs

* Cp. *Patrick Henry*, 3 *Elliott's Debates* 544:

"No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed."

were granted by the Court of King's Bench at Westminster on motions for new trials, (2) that the trial judge did not necessarily sit in the court en banc considering such motions, (3) hence: remittitur was a practice exercised by an appellate (reviewing) court prior to 1791. Although, at first reading, this conclusion may appear to be logical, it is basically fallacious. The authorities recited themselves demonstrate that the fallacy lies in the failure to recognize the nature of the Court of King's Bench and the practice before it.

Jurisdiction of the King's Bench was dual in nature: it was not only an appellate court, reviewing judgments of the common pleas and lesser courts, upon its own writs of error, but it was also a court of original jurisdiction for practically every type of action.[1] It generally sat at Westminster and was composed of a Chief Judge and three associate judges.[2] As a nisi prius court, however, it dispatched its individual judges to hold jury trials in the counties.[3] Motions for new trials after verdicts, however, were not heard at the place of trial, but were considered by the court en banc at Westminster.[4] Such a motion followed the verdict (postea)[5] and judgment was not entered until the motion was denied,[6] a practice which is still followed in many of our State courts. The definitive point is that the motion was passed upon by the same court in which the action was begun and in which it was tried. It is not factual to state that consideration of the motion constituted an appellate review. Not a single authority has been found in which King's Bench, acting as an appellate court after judgment, had granted a new trial or directed a remittitur for excessiveness of a verdict.

---

[1] Holdsworth, History of English Law, Vol. 1, 212 ff; Radcliffe & Cross, The English Legal System (2d ed.) 161.

[2] 1 Tidd's Practice (1807) 28, 29.

[3] Holdsworth, op. cit. 281; 2 Tidd's Practice (1807) 772.

[4] Radcliffe & Cross, op. cit., 182.

[5] 2 Tidd's Practice (1807) 819 ff; Holdsworth, op. cit. 282.

[6] Tidd, op. cit. 841; 3 Blackstone, Commentaries, 393.

Appellate review was permitted to King's Bench from inferior courts and from King's Bench (as a trial court) to Exchequer Chambers or the House of Lords as a matter of right,[7] but no issue of fact ever was or could be re-examined on such review.[8]

Review of a jury verdict by the same court, even though by a different division of it and even though that division be designated as an "appellate court" is still review at the trial court level. This was specifically decided by this Court in *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 573 (1887).

Reliance is also frequently placed upon the historical data considered by Mr. Justice Stone (Chief Justice Hughes, Mr. Justice Brandeis and Mr. Justice Cardozo concurring) in his dissenting opinion in *Dimick v. Schiedt*, 293 U.S. 474, 488 (1935). This opinion, by reason of the preeminence of its authors, is certainly entitled to due consideration, but the issue before the Court in that case must be clearly understood. The trial judge, believing that the verdict of the jury was inadequate, directed an additur to which **the defendant agreed.** The First Circuit reversed (70 F. 2d 558) holding that the trial court's action violated the Seventh Amendment since the plaintiff's consent was not given. Mr. Justice Sutherland, speaking for this Court, found no English authority prior to 1791 which permitted an additur by the trial court and held that the practice of conditional remittitur consented to by the plaintiff did not authorize unconditional additur to which the plaintiff did not consent. The burden of the dissent is, first, that the action of the trial judge was discretionary and not subject to review by the Circuit (489) and, then, that the power of the trial judge is not so limited by the Amendment (495). The latter position is

[7] 3 Blackstone, 410-411; 2 Tidd's Practice (1807) 1051, 1059-1061; Radcliffe & Cross, op. cit. 208 ff.

[8] Tidd, op. cit. 1057; Patrick Henry, 3 Elliott's Debates 544.

justified by the assertion that the common law's "flexibility and capacity for growth and adoption" will permit the exercise of the trial judge's discretion by additur with the consent of the defendant since it undoubtedly allows remittitur with the consent of the plaintiff. The dissenter's position on the first issue is of no comfort to those seeking to avoid Constitutional limitation. It is consistent with the holdings of this Court prior thereto. The second point deals not with the power of the appellate court but with the discretionary power of the trial court and is of no moment here.

Let us consider the position taken by the Courts of Appeals on this point as set forth in detail. *Dagnello*, supra, is typical (and is cited as its authority by the court below in the case at bar). Judge Medina begins his opinion with a recitation (amply footnoted) that the State appellate courts have exercised the power of review (799), ignoring the fact that this Court has consistently held that the Seventh Amendment has no application to State courts: *Minn. & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Ches. & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916). Proceeding to the position of this Court, he states (800) that "there is no clear and unequivocal holding" that a Seventh Amendment limitation exists, ignoring the decisions of this Court from 1830 to 1933. He brushes by the language of *Fairmount Glass Works* (800) and mentions *Affolder's* use of the word "monstrous" (801) as "no more than a hint" that appellate review is permissible. Next he quotes *Neese* (802) and refers to the rulings in other Circuits (802) without apparent recognition of the complete difference between their holdings and the *Neese* dictum, a difference fully recognized later by his own Circuit in *Caskey*, (infra). Following this, his argument goes to common law history that "motions for new trial were not addressed to the trial judges", a half-truth (ignoring

Blackstone[9] and Mr. Justice Story[10] since it was the court en banc which had this power in the Court of King's Bench, the trial judge usually (if not always) sitting on the Court: *Jones v. Sparrow*, 101 E.R. 144, 5 T.R. 257 (1793); *Ducker v. Wood*, 99 E.R. 1092, 1 T.R. 277 (1786). He quotes the dissent in *Dimick* extensively (803-804). Holding (804) that the English precedents there cited permitted "appellate review", he ignores *Metropolitan Railroad Co. v. Moore*, in which this Court specifically held that review by the same court was not appellate review, even though the procedure to obtain it was labeled an "appeal" instead of a "motion for new trial".

The argument made on this point is not impressive. (It is coupled, however, with the other arguments which we will discuss below.) His conclusion (806) that "It is strange that the rule of non-reviewability should have hung on so long, despite the practically unanimous protests of text writers and commentators" is difficult to accept. In the first place, the leading authority today has this to say: *Barron & Holtzoff, Federal Practice and Procedure* (Rules Ed. 1958), Vol. 3, §1302.1, p. 55:

> "To allow appellate review of his action would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge, by denying the motion for a new trial, has found that the verdict is not contrary to the clear weight of the evidence. This would be a complete re-

---

[9] 3 Blackstone, Commentaries, 392-393: "And it is worthy (of) observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe . . . the parties are at liberty, whenever they please, to appeal from day to day, and from court to court, upon questions merely of fact; which is a perpetual source of obstinate chicane, delay, and expensive litigation. With us no new trial is allowed unless there be manifest mistake, and the subject-matter be worthy of interposition."

[10] Parsons v. Bedford, 3 Pet. 433.

versal of the common law practice, and does not seem consistent with the Seventh Amendment."

Secondly, to assume that any text writer (including student law review commentators) is in a better position to evaluate the status of the English common law prior to 1791 than Mr. Justice Story and his colleagues at the turn of the century is presumptuous. Finally, to disregard and ignore every opinion on the subject written by this Court prior to 1933 is unforgivable. No decision of any other Court of Appeals using this argument adds weight to it and an extended review of them would be unproductive. They are collated in *Barron & Holtzoff*, op. cit. supra, at pp. 348 ff.

Having no forebears in the common law, appellate power to review the quantum of verdicts may not be assumed without violating the Seventh Amendment.

(b)

It is also argued that an appellate court may review the "discretion" of the trial judge and reverse for "abuse of discretion" in failing to set aside or reduce the amount of a verdict. This argument proceeds on the basis that although the trial judge's review of the jury's verdict is a review of "fact", the appellate review for "abuse of discretion" is a review of a question of law and so not prohibited by the Amendment. The argument is unsound.

That the amount of a verdict is "purely a question of fact" has been reiterated by this Court in many of its decisions: cf. *Dimick v. Schiedt*, 293 U.S. 474; 486 (1935); *St. Louis & S. R. Co. v. Craft*, 237 U.S. 648, 661 (1915); *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 574 (1887). In what manner does the exercise of the trial judge's discretion in reviewing this "question of fact" become converted into a "question of law"? Again we refer to the prototype, *Dagnello* (806): ". . . but surely there must be an upper limit, and whether that has been

surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." Justice Medina gives no explanation as to how this tranformation takes place. In no other area is it applied or even suggested. If it were true, how would it be applied? It must follow that every issue of fact may be converted into a question of law upon which both appellate courts may bring to bear their own discretion as to whether discretion has been properly exercised below. This is unthinkable. As Mr. Justice Black has said in *Galloway* (supra, at 407):

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: 'Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right.' So few of these cases come to this Court that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeals are the primary custodians of the Amendment."

If this conversion from fact to law at the discretion of the appellate courts is recognized, review must be permitted of every issue of fact referred to below in which the evidence against the verdict may be designated on appeal as being overwhelming or opposed to physical facts or the like. When passing an "upper limit" in amount becomes a question of law, so must also passing an upper limit in

the amount of testimony presented against any other factual issue. Even judges who accept the "abuse of discretion" view, sometimes are led to question its validity. Consider Judge Sobeloff's note in *Simmons v. Avisco, Local 713*, 350 F. 2d 1012, 1020 (1965):

> "If it seems strange for the higher tribunal to have in this area less freedom than the lower, it is a lesser anomaly than exists in the federal criminal law, where appellate courts are without power to review sentences imposed by district judges. More instances arise where we would be moved to reduce extravagant prison sentences than immoderate jury awards in civil cases. In both instances we must respect the boundaries of our authority, and a change in the policy does not lie in our hands but must be legislatively ordained."

(Cf. *United States v. Johnson*, 327 U.S. 106, 111 (1946)).

The refusal of this Court to grant certiorari heretofore (except in *Neese*) has permitted the Courts of Appeals to act without further definition of the principle upon which they may act. Differing as they do in the approach of each Circuit and even in succeeding decisions of the same Circuit, they have a common factor. Each test is a subjective one. The determination of each case may as well be based upon the state of a circuit judge's digestion as his state of mind. And its application in a particular case may be as uncertain as the former. Its effect is to permit discretion to overrule discretion. If the power of supervision is to be recognized it must be exercised upon an objective basis. The difference is not only in degree but in kind.

Even what appears to be purely objective assessment of excessiveness in value of very ordinary things will, upon careful consideration, be found to be subjective. For example: the average person would probably say that a cup of coffee should cost fifteen cents, that a quarter

or half-dollar for a cup would be "excessive" but not "monstrous". Yet, the restaurant which charges a dollar and a half is not without customers. More analogous to the evaluation of "pain and suffering" would be the price demanded for a work of art. Here excessiveness would be purely subjective. The best evidence of this is the bidding at an auction of paintings. Even the successful bidder may feel that the price he has paid is "excessive"; his competitors certainly must have felt so. But now once removed is the buyer's wife, friend or another art dealer who "second-guesses" the value of the purchase.

So it must be with the subjective reaction of an appellate judge as to whether the trial judge "abused his discretion" in reviewing the excessiveness of the verdict of a jury. Perhaps the word "monstrous" used by this Court in *Affolder* is the proper one; not in the way it was analogyzed to "excessive or extraordinary" by Circuit Judge Holmes (187 F. 2d at 484) but in the way it was originally used by the Lord Chief Justice in *Beardmore v. Carrington*, 2 Wilson 244, 95 E.R. 790 (1764): . . . "the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush". "All mankind" certainly cannot be said to "exclaim against" the verdict in the case at bar when the trial judge who saw and heard the parties and the witnesses approved it fully and one of the three reviewing judges felt that it was justified by the evidence.

Judge Learned Hand is frequently quoted as an exponent of the view that appellate review is desirable. This is true: *Miller v. Maryland Casualty Co.*, 40 F. 2d 463, 465 (1930); but it is he who suggested "unconditional power to review" (*ibid*), which this Court has already specifically denied in *Neese*. In the same decision, his view of the "abuse of discretion" rule is quite to the contrary. Of it he says (465):

> "That is an impracticable rule . . . The trial judge decides what verdict is within the bounds of reasonable

> inference from the evidence . . . we must come at the matter at one remove, and apply the same test to the judge's decision that he applies to the jury's. We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements."

Even Judge Holmes, in his oft-quoted opinion in *Sun-Ray Oil Corp.*, supra (187 F. 2d at 482) says of the principle of review for abuse of discretion: "This is judging by remote control, and at best is a circuitous and unsatisfactory method."

The extent to which a purely subjective approach may affect the exercise of the judicial function is well demonstrated by the unsupported barb thrust at the trial judge by the court below (A. 64):

> "In his enthusiasm for what he described to the jury after the verdict as their fine 'spirit' and 'dedication' and 'with resounding emphasis in plaintiff's favor all down the line' the trial judge, we think, supplied any 'absence of exaggeration' in plaintiff's testimony by doing a little exaggerating himself, as appears in the quotations cited in the dissent."

Once this Court were to agree that review by a Court of Appeals is permissible, it must likewise agree that it will, in like manner, review the latter's action in any case in which it disagrees with the trial court. Since "abuse of discretion" would thereby be established as being a question of law, its exercise by the Court of Appeals must be equally reviewable for its abuse. The "abuse of discretion" view is based upon the assumption that competence to exercise discretion multiplies with the number of judges who act despite their

admitted shortcomings in examining the evidence because they did not see or hear the parties and the witnesses.[11] What, then, of the appellate bench which is divided (as was the court below)? Or a court of appeals which, having seven members en banc, divides four to three? Or this Court, which not infrequently must decide important causes by a bare majority or affirm by an equally divided vote? On such a subjective matter as "abuse of discretion" can it justly be contended that an equal number of judges who have passed upon the issue and divided so sharply have disposed of it by any other than "tenuous unrealities" and to have bound the parties by "gossamer strands"?

(c)

A final argument is made that modern procedures recommend the reexamination of this Court's early decisions and reinterpretation of the Amendment. Our history leaves no doubt that our forebears considered trial of fact by jury rather than by judges an essential bulwark of their liberty. The Constitution, in providing for the establishment of the courts, contained no provision guaranteeing this right in civil cases. Mr. Justice Gray in *Capital Traction Company v. Hof*, 174 U.S. 1 (1899) and Mr. Justice Black, dissenting, in *Galloway v. United States*, 319 U.S. 372, 397 (1943), have reviewed the origin of the Seventh Amendment and demonstrated beyond peradventure that its very purpose was to prevent judges from interfering with factual decisions.

If the history of the English law prior to 1791 and the history of the Colonies at that time prove anything, it is the unwillingness of the citizen (and lawmaker) to submit issues of fact to the decision (or discretion) of the judges. Their faith lay in the jury and any interference with its decision could not be countenanced. It is impossible to

[11] Hinton, 1 U. of Chi. L.R. 111, 113, suggests that the lack of review in appellate courts in England may be ascribed to the en banc hearing of new trial motions by "four judges who were quite as competent to handle the matter as any reviewing court."

imagine that those who insisted upon the adoption of the Seventh Amendment would have approved its language were they not certain that appellate review of facts found by a jury would not be disturbed except by the court in which the jury served.

Now to reinterpret it so as to permit such review on the basis of "discretion" would not only destroy the constitutional right which deserves preservation but would disservice the administration of justice.

II.

FEDERAL EMPLOYERS' LIABILITY ACT

Assuming (as we must for the purpose fo this argument) that this Court may decide that the action of the court below is not constitutionally prohibited, to what extent may it be exercised in an action under the Federal Employers' Liability Act? We do not claim that the Act limits the "jurisdiction" of Courts of Appeals as does the Seventh Amendment. Our position is that, under the decisions of this Court, appellate review of actions under this Act is so narrowly limited that "abuse of discretion" (the reason asserted by the court below) is not an authorized ground for appellate intervention.

The preservation of the integrity of a jury verdict in an action under the Act is an integral part of the right to trial by jury given the railroad worker. In *Dice v. Akron C. & Y. R.R.*, 342 U.S. 359 at 363 (1952), Mr Justice Black, quoting the language of *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943) stated:—

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence'; . . . that it is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act; and that to deprive railroad workers of the benefit of a jury trial where there is evidence of negligence 'is to

take away a goodly portion of the relief which Congress has afforded them.' "

This Court has been firm in safeguarding this right. The limitation on the power of the Courts of Appeals in these cases has been reiterated to be no more than to determine whether there is any evidence whatever to support the jury verdict. It does not include interference with findings of fact if supported by the record. As stated by Mr. Justice Murphy in *Lavender v. Kurn*, 327 U.S. 645 (1946) at 653:—

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion and **the appellate courts' function is exhausted when that evidentiary basis becomes apparent**, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis supplied).

Therefore, this Court has consistently reversed every appellate interference with a jury verdict, unless there was a complete absence of supporting evidence. *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943); *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943); *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Ellis v. Union Pacific R. Co.*, 329 U.S. 649 (1947); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Stinson v. Atl. Coast Line R. Co.*, 355 U.S. 62 (1957); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957); *Moore v. Terminal Railroad Assn.*, 358 U.S. 31 (1958); *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959); *Basham v. Pennsylvania R. Co.*, 372 U.S. 699 (1963); *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1968); *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248 (1963); *Dennis v. Denver & Rio Grande R. Co.*, 375 U.S. 208 (1968). This test has been applied to

such fact issues as negligence: *Rogers v. Missouri Pacific R. Co.*, supra; employment status: *Baker v. Texas & P. R. Co.*, 359 U.S. 227 (1959); medical causation: *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959); legal causation: *Gallick v. Baltimore & Ohio R. Co.*, supra; and validity of a release: *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359.

The amount which should be properly awarded as damages is no less a fact issue, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 574 (1887). In *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), this Court stated that the power to review the excessiveness of a verdict (if it exists at all) is as narrowly limited as it is as to any other issue of fact:

> "We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

The power of review, therefore, does not include the power to declare that a trial judge has abused his discretion or to set aside or reduce a verdict because, subjectively, it is thought to be excessive. The appellate power to interfere is exhausted if there is any evidence in the record to sustain the verdict. It is not increased by the difference in remedy afforded when the limited power thus given is exercised. If, within its scope, an issue of liability may be found to be completely unsupported by any evidence, a judgment n.o.v. may be entered. If, within the identical scope, the amount of a verdict is found to have no support whatsoever in the evi-

dence, a new trial may be ordered or a remittitur directed. In either case the test is the same, the limitation on appellate power is the same, and in neither situation may the Court of Appeals interfere merely because it believes that the trial judge "abused his discretion" or it subjectively feels that the "verdict was excessive".

The action of the court below is not based upon the standard so enunciated. Although its own most recent decision (*Caskey v. Village of Wayland*, 375 F. 2d 1004, 1007 (1967)), recognizes the rule enunciated in *Neese*, both this decision and *Neese* are ignored. The majority of the panel of the court below makes no effort to demonstrate that the "action of the trial court . . . (is) not without support in the record". It briefly reviews the nature of the injuries (A. 65, 388 F. 2d at 484) but the evidence upon which the jury reached its verdict is not otherwise examined. Nor is any effort made to explain its refusal to consider or accept clearly expressed findings of the trial judge justifying his action in approving the jury's verdict (A. 54). Nor does it attempt to characterize his action as an "abuse of discretion" or even that it "shocks the conscience of the court". It confines itself to its unsupported conclusion that the verdict is "grossly excessive" (A. 61, 64, 388 F. 2d at 482, 483).

That this is not a justifiable ground for appellate intervention, even under the prior decisions of its own Circuit, is succinctly stated by Circuit Judge Hays in his dissenting opinion (A. 66, 67; 388 F. 2d at 485).

III.

THE VERDICT IS SUPPORTED BY THE RECORD

A review of the evidence will demonstrate unequivocally that "the action of the trial court . . . (is) not without support in the record . . ." *Neese v. Southern Ry. Co.*, supra.

Petitioner sustained crushing injuries of the right foot which have resulted in total and permanent disability and

continuous pain and suffering. He proved (without contradiction) that he was a strong, healthy individual, 41 years of age at the time of this accident, and that he had worked for the respondent in laboring work for over 20 years prior thereto (A. 31). At the time of his injury he was earning over $6,000 per year (A. 48) and wages for employes in his classification have consistently increased since his injury (A. 27). On the basis of this evidence, he had lost over $27,000 (less a few dollars earned at odd jobs) up to the time of trial.

At the time of trial, petitioner's life expectancy was 27.5 years according to the latest U.S. Life Tables for white males (A. 48). Since there was no compulsory retirement age and petitioner's job was admittedly secured (except for discharge for cause) (A. 27, 28), the jury was entitled to find that his loss of future earnings (earning power) amounts to at least $165,000. Argument was made by the respondent that petitioner still had some earning power in the future but this the jury apparently refused to accept. The reason is clear from the record: petitioner has never worked at a sedentary job (A. 31), he has been refused reemployment by the railroad (A. 38, 43), his Brotherhood is unable to secure him such employment (A. 28) and his injury prevents him from sitting, standing or walking for any extended time (A. 20, 24). In addition, he is an employment risk for any prospective employer: his foot is, after 4½ years, still in such condition that a minor bump or bruise may cause the lesions to break out again (A. 20) and increase in the pain he suffers may necessitate amputation of the foot (A. 19). It would be foolhardy for any employer to hire him and expose itself to these dangers—this was clear to the jury from the uncontradicted medical testimony.

Respondent argued to the trial judge on its motion for new trial that this prospective loss of earning power must be reduced to "present worth". It did not except to the Court's instruction on this question. It completely

overlooked the fact that assured increases in wage rates (A. 27), overtime work (A. 48) and the probability of promotion to higher paying jobs might amount to as much or more than the discount rate of "present worth" to be considered. These matters and how they would affect petitioner's losses were equally for the jury's sole consideration. Certainly it was not only within their province but only fair, just and reasonable that the verdict include at least $27,000 lost to date plus at least $165,000 for loss of future earning power, a minimum total of $192,000.

We now come to the jury's assessment of the value of the petitioner's pain, suffering, inconvenience and embarrassment. The medical testimony was unquestioned. Petitioner has had five separate hospitalizations (A. 6-11) during which he has had two operations on his foot (A. 11, 14) and a sympathectomy to help restore the blood supply (A. 8). The bones of the toes were crushed into a mass without movement and with no hope of improvement (A. 16-19). Weeping sinuses have been closed but the skin is subject to breaking down upon minor contact (A. 20, 38). Pain has persisted for 4½ years and it is continuous (A. 36, 39). To this point, petitioner has been able to live with it, treating the foot daily and limping along through his daily routine (A. 40). Should the pain be increased by a bruise or bump or the circulation be further impaired or infection (to which he will be highly susceptible) set in, amputation will be his sole choice (A. 20). In addition, petitioner was entitled to be compensated for the effect of his injuries upon his normal pursuits and pleasures of life (A. 66). The Court charged the jury fairly (and without objection by the respondent) on all of these issues. It would not have been shocking had the jury determined that the monetary value of his pain, suffering and inconvenience was in excess of the out-of-pocket losses which he has suffered and will suffer. They may well have assessed $113,000 for this item in addition to the $192,000 previously determined. Or they may reasonably have reduced

the $192,000 figure and increased the $113,000 materially. The trial judge expressed the view that the evidence supported the verdict based upon an assessment of $27,000 for lost wages, $150,000 for loss of future earning power and $150,000 for pain and suffering (A. 56), so that a total verdict of $327,000 would not have been excessive.

With this uncontested proof in evidence, what justification can be found to declare that the verdict is "without support in the record"? The majoriy made no attempt to do so. The dissenting member of the Court of Appeals' panel could find none (A. 66); he accurately stated that the court was merely substituting its opinion for the verdict of the jury (A. 67).

The case at bar presents a much stronger case for reversal on the merits than did *Neese*. There the Court of Appeals extensively reviewed the testimony, all of which related to losses which could be calculated mathematically, and reversed because it felt that it could not justify the reduced verdict. Here only a portion of the verdict could be calculated mathematically but even that part the lower court did not attempt to review in its opinion.

It may well be that, so long as the Courts of Appeals adhere to the limitations of *Neese*, this Court will continue to abstain from restating the constitutional restriction upon appellate power. But when, as here, a long stride backward from its teaching is taken without justification, intercession on an ad hoc basis is necessitated and restatement may well be indicated. Early in our judicial history Mr. Justice Story recognized that permitting review of the exercise of discretion in any case will encourage appeals and is "against sound policy and public convenience". *Hobart v. Drogan*, 10 Pet. 108, 119 (1836).

IV.

Petitioner concedes that, if this Court should hold that the Court of Appeals has the power to grant a new trial and is justified in doing so upon the present record, it also has the power to make and is justified in making the order of remittitur which it did make in this case, as contended for the Respondent.

The final point made in the petition for certiorari need not now be urged. It was there contended that the remand for a new trial generally in the absence of a remittitur was improper. Respondent, in its Brief in Opposition (11) "interprets the mandate below as requiring a new trial on damages" alone and assumes to urge such a construction thereof should the occasion arise. This the petitioner accepts.

CONCLUSION

The decision of the Court of Appeals should, therefore, be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

MILFORD J. MEYER
One East Penn Square Building
Philadelphia, Pennsylvania
Attorney for Petitioner

Of Counsel:
IRVIN YOUNGER
MEYER, LASCH, HANKIN & POUL